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# Title IX's Protections for Transgender Student Athletes

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# TITLE IX'S PROTECTIONS FOR TRANSGENDER STUDENT ATHLETES

*By Scott Skinner-Thompson and Ilona M. Turner**



## INTRODUCTION

While transgender rights are steadily gaining ground across a number of areas—employment rights, access to health care, identity recognition—transgender people still often face obstacles in gaining equal access to the world of competitive athletics. Many people feel uncomfortable with the idea

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of transgender athletes—particularly transgender women and girls[1]—competing alongside non-transgender peers, even in elementary and secondary school sports. This article deconstructs these concerns and argues that transgender students in K-12 schools must be permitted to participate in athletics according to their gender identity. Such a policy is consistent with legal authority under Title IX and Title VII and, more importantly, best advances the well-being of already vulnerable transgender youth by helping to incorporate and include such students in activities that are critical to physical, social, mental, emotional development, and health.

Dispelling some of the concerns regarding transgender athletic inclusion, schools, local governments, and interscholastic athletic associations are increasingly recognizing the rights of transgender individuals to participate fully and equally on teams consistent with those individuals' gender identities. And transgender athletes have been successfully integrated into sports teams without creating competitive inequalities, injuries, or social disruption. For example, an 11-year-old transgender girl, Jazz, was recently permitted to play on a girls' recreational soccer team after the United States Soccer Federation directed that, consistent with her gender identity, she be allowed to play on the girls' team.[2] Similarly, the National Collegiate Athletic Association (NCAA) recently issued guidelines providing that transgender athletes may participate on sports teams consistent with their gender identity provided the athletes comply with rules governing the use of hormone treatment.[3] California also recently enacted a law that requires the state's K-12 public schools to permit students to participate on sports teams that match the students' gender identity.[4]

These trans-inclusive policies demonstrate that transgender children can be treated fairly and incorporated fully into athletic competitions without prejudicing any other participants, creating an unequal playing field, or creating a significantly increased risk of injury. Fostering such inclusion while students

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1. A transgender girl refers to a young person who was assigned male at birth but identifies as a girl. A transgender boy is a young person who was assigned female at birth but identifies as a boy.

2. *See, e.g.*, Pablo S. Torre & David Epstein, *The Transgender Athlete*, SPORTS ILLUSTRATED (May 28, 2012), *available at* http://sportsillustrated.cnn.com/vault/article/magazine/MAG1198744/1/index.htm.

3. Transgender men are permitted to play on either a men's or women's team if they have not taken testosterone; once they begin treatment with testosterone they are no longer eligible for women's teams. Transgender women are eligible to play on a women's team after they have undergone one year of hormone therapy. *See* Marta Lawrence, *Transgender Policy Approved*, NCAA (Sept. 13, 2011) http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2011/September/Transgender+policy+approved.

4. *See* Patrick McGreevy, *California Transgender Students Given Access to Opposite-Sex Programs*, LOS ANGELES TIMES (Aug. 12, 2013), *available at* http://www.latimes.com/local/political/la-me-pc-gov-brown-acts-on-transgender-bill-20130812,0,706863.story; *see also* Ian Lovett, *Changing Sex, and Changing Teams*, NEW YORK TIMES, *available at* http://www.nytimes.com/2013/05/07/us/transgender-high-school-students-gain-admission-to-sports-teams.html?hp&_r=1&.

are still in primary and secondary school will have a dramatic impact in reducing feelings of stigmatization and isolation that many transgender individuals experience. Such policies provide an environment where transgender children feel safe and supported. This inclusion will also serve to help educate non-transgender youth about the importance of treating all people fairly, including, but not limited to, their transgender peers.

As will be explained, not only is such inclusion the best policy, but it is consistent with, and, in fact, required by Title IX and related sex-discrimination jurisprudence. Part II of this article details Title IX jurisprudence regarding the integration of females onto traditionally male teams (and vice versa) and explains how that jurisprudence supports the inclusion of transgender athletes. Part III discusses case law developments specific to transgender individuals under Title IX and other sex-discrimination laws; developments which have increasingly recognized that discrimination against transgender people is a cognizable form of sex discrimination. Part IV delves into the possible justifications for barring transgender student-athletes from participating on the team that matches their gender identity, concluding that the purported concerns about safety and privacy have little basis in fact, particularly when applied to students in primary and secondary school. Indeed, for that reason, school districts and athletic associations across the country have begun adopting policies—many of which are described in Part IV as examples of "best practices"—that allow transgender students to participate on athletic teams based on their gender identity. Finally, Part V looks at the developmental benefits of participation in sports, concluding that equal access to athletic competition is critically important for the well-being of transgender young people.

## I. TITLE IX AND SEX SEGREGATION IN SPORTS

Title IX and jurisprudence regarding the limits of sex segregation support the inclusion of transgender athletes. Passed in 1972, Title IX of the Education Amendments of 1972 prohibits discrimination "on the basis of sex . . . under any education program or activity receiving federal financial assistance."[5] While the original statute itself did not specifically mention sports,[6] Title IX's implementing regulations specifically name and prohibit discrimination in athletics. The implementing regulations for Title IX provide that "[n]o person

5. 20 U.S.C. §§ 1681-1688.

6. *See* McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck, 370 F.3d 275, 287 (2nd Cir. 2004) ("After Title IX was passed, there were efforts to limit the effect of the statute on athletics programs. In . . . .1974 . . . Congress enacted a provision known as the Javits Amendment, which instructed the Secretary of Health, Education, and Welfare ("HEW") to 'prepare and publish . . . proposed regulations implementing the provisions of Title IX of the Education Amendments of 1972 relating to the prohibition on sex discrimination in federally assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports.'").

shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient [of federal funds], and no recipient shall provide any such athletics separately on such basis."[7] But the implementing regulations also permit schools to "operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport."[8] Accordingly, the regulations recognize that schools may institute gender-segregated teams in certain circumstances, but also state that individuals cannot be denied the opportunity for equal participation in sports on the basis of their sex. These regulations, Title IX case law, and the reasoning behind each, all lead to the conclusion that transgender students in elementary and secondary schools must be permitted to participate on sports teams consistent with their gender identity.

### *A. Concerns Regarding Physical Differences Between the Sexes and Potential Injury Do Not Justify Trans Exclusion*

Concerns that permitting transgender students to participate in K-12 athletics will lead to injuries for transgender males competing with cisgender[9] males, or cisgender females competing with transgender females, or competitive advantages or disadvantages, lack merit. These same arguments were previously advanced (and rejected) in an attempt to justify restricting girls from participation in sports altogether and, later, from participation on all-male sports teams where no female equivalent was offered. While much of the increased opportunity for girls created by Title IX has come from the creation of sex-segregated girls' athletic teams,[10] when sex-segregated teams have not been created, girls have often been permitted to participate on traditionally all-male athletic teams.[11] Courts have routinely rejected arguments that physical differences between the sexes justify exclusion of females from otherwise all-male sports teams.

For example, in *National Organization for Women, Essex County Chapter v. Little League Baseball, Inc.*, a New Jersey state court concluded that, pursuant to a New Jersey public accommodation anti-discrimination law, girls could not be excluded from participation in Little League Baseball, and that there was "substantial credible evidence . . . that girls of ages 8-12 are not as a class subject to materially greater hazard of injury while playing baseball than

7. 34 C.F.R. § 106.41(a).

8. 34 C.F.R. § 106.41(b).

9. "Cisgender" means a person whose gender identity matches the sex they were assigned at birth. The term is increasingly used as a synonym for "not transgender."

10. 34 C.F.R. § 106.41(c) (requiring schools to "provide equal athletic opportunity for members of both sexes").

11. *See infra* text accompanying notes 13-18.

boys of that age group."[12] Accordingly, the court held that girls "must be invited and admitted as freely and as unreservedly as the boys."[13] Similarly, in *Force v. Pierce City R-VI School District*, a federal district court held that a junior high school's prohibition on female participation on the football team was impermissible under the Equal Protection Clause of the Fourteenth Amendment.[14] The court specifically rejected the justification that because a typical 13-year-old female would allegedly have a higher potential for injury than a 13-year-old male, exclusion of females was permissible.[15] Instead, based on expert testimony, the court reasoned that "some 13 year old females could safely play eighth grade football in mixed sex competition, and some 13 year old males could not."[16] Yet, the school allowed all boys the opportunity to play football.[17] Thus, the court held that there was no valid justification for the wholesale exclusion of females from the football team.

The Washington State Supreme Court reached a similar result in *Darrin v. Gould*.[18] There, the court held that the policy of the Washington Interscholastic Athletic Association (WIAA) and a local school district which forbade girls from playing on high school football teams violated the Washington State Constitution. The court rejected the claimed justification that "the *majority* of girls are unable to compete with boys in contact football, and the potential for injury is great."[19] Like the Court in *Force*, the court in *Darrin* concluded that "[b]oys as well as girls run the risk of physical injury in contact football games. The risk of injury to 'the average boy' is not used as a reason for denying boys the opportunity to play on the team in interscholastic competition. Moreover, the fact that some boys cannot meet the team requirements is not use as a basis of disqualifying those boys that do meet such requirements."[20] Thus, the Court concluded, the proffered rationale of keeping girls safe from injury lacked consistency and could not justify the discriminatory policy preventing all girls from participating on the football team.[21]

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12. Nat'l Org. for Women v. Little League Baseball, Inc., 318 A.2d 33, 37 (N.J. Super. Ct. App. Div.), *aff'd*, 338 A.2d 198 (N.J. 1974).

13. *Id.* at 41.

14. Force v. Pierce City R-VI Sch. Dist., 570 F. Supp. 1020, 1022-32 (W.D. Mo. 1983).

15. *Id.* at 1028-29.

16. *Id.* at 1029.

17. *Id.*

18. Darrin v. Gould, 85 Wn.2d 859, 877 (Wash. Sup. Ct. 1975).

19. *Id.* at 875 (emphasis in original) (quotations omitted).

20. *Id.* at 876.

21. Numerous courts have reached this conclusion. *See, e.g.*, Fortin v. Darlington Little League, Inc., 514 F.2d 344 (1st. Cir. 1975) (rejecting argument that physical differences between boys and girls warranted exclusion of girls from little league baseball teams and holding that such a practice violated the Equal Protection Clause of the Fourteenth Amendment); Leffel v. Wisconsin Interscholastic Athletic Ass'n, 444 F. Supp. 1117, 1122 (E.D. Wis. 1978) (holding that "the exclusion of girls from all contact sports in order to protect female high school athletes from an unreasonable risk of injury is not fairly or

Put simply, courts have often rejected essentialist arguments claiming that girls are physically incapable of participating in youth sports with boys.[22] This case law, and the reasoning underpinning it, requires that similar arguments currently being made against the inclusion of transgender student athletes also be rejected. For K-12 students in particular, the physical differences between male and female students are not so significant as to justify forbidding transgender students from participating in sports consistent with their gender identity or for imposing any medical requirements before allowing such participation. There is significant overlap between the range of size and strength of boys and girls, thus making it likely that an individual transgender student would fit within the range of other team members and competitors.

The physical differences between male and female bodies become accentuated with adulthood, which is why the NCAA adopted a policy that requires transgender women to take testosterone-suppressing hormones for at least a year before competing on women's teams.[23] But those hypothetical physical differences cannot justify a blanket rule barring transgender students in K-12 schools from participating in sports according to their gender identity. Nor is a rule requiring medical treatment or hormone therapy practical at the K-12 level, as such treatment is largely unavailable to minors due to costs and other access barriers.[24] Accordingly, the best approach is that adopted by an

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substantially related to a justifiable governmental objective in the context of the fourteenth amendment); Lantz by Lantz v. Ambach, 620 F. Supp. 663, 665 (S.D.N.Y. 1985) (holding as unconstitutional a state regulation that forbid all girls from playing football and rejecting presumed physical differences between boys and girls as a valid justification for the exclusion of all girls); Saint v. Neb. Sch. Activities Ass'n, 684 F. Supp. 626, 629 (D. Neb. 1988) (holding that rule forbidding girls from wrestling was a "paternalistic gender-based classification, that is, one resulting from ascribing a particular trait or quality to one sex, when not all share that trait or quality [that] is not only inherently unfair, but generally tends only to perpetuate stereotypical notions regarding the proper roles of men and women")(internal quotations and citations omitted).

22. *See also* Erin E. Buzuvis, *Transgender Student-Athletes and Sex-Segregated Sport: Developing Policies of Inclusion for Intercollegiate and Interscholastic Athletics*, 21 SETON HALL J. SPORTS & ENT. L. 1, 6-8 (2011) (discussing cases addressing the injury rationale for excluding females from all-male athletic teams).

23. *Id.*; *see* discussion *supra* note 3.

24. *See* Stuart Biegel, THE RIGHT TO BE OUT: SEXUAL ORIENTATION AND GENDER IDENTITY IN AMERICA'S PUBLIC SCHOOLS 179 (2010) ("Not only are those who desire gender reassignment surgery of any kind not generally able to afford it at this stage of their lives, but doctors do not typically perform such surgeries on people that young. This reality is central and cannot be ignored."); Dean Spade, "Compliance is Gendered: Struggling for Gender Self-Determination in a Hostile Economy," in TRANSGENDER RIGHTS 218-19 (2000) ("Economic and educational opportunity remain inaccessible to gender transgressive people because of severe and persistent discrimination, much of which remains legal, . . . Many trans people start out their lives with the obstacle of abuse or harassment at home, or being kicked out of their homes because of their gender identities or expressions."). *See also* World Professional Ass'n for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People, Version 7*, INT'L J. OF TRANSGENDERISM, Vol. 13, p. 178, *available at* http://www.wpath.org/documents/IJT%20SOC,%20V7.pdf ("Genital surgery should not be carried out until (i) patients reach the legal age of majority to

increasing number of states, including California, Washington, and Massachusetts, which permit any K-12 student to participate in sex-segregated sports in accordance with his or her gender identity.[25]

### *B. Concerns Regarding Unfair Competition or Diminution in Opportunities for Females Do Not Justify Trans Exclusion*

Another potential concern that is sometimes raised regarding the inclusion of transgender females on female sports teams is that, as a result of transgender females' purported physical superiority allegedly resulting from having been born physically male, they will dominate the female athletic competition, depriving cisgender females of the opportunity to fairly and successfully compete. Without question, ensuring that young women are provided an opportunity to compete in sports is one of Title IX's most important objectives.[26] However, as noted above, in the context of youth sports, the physical differences between males and females are not significant enough to justify a belief that a transgender female would inevitably prevail against cisgender female athletes.[27] Nor is such speculative concern sufficient to outweigh the importance of permitting transgender females to participate in sports on a nondiscriminatory basis. Inclusion of transgender female athletes possesses little to no risk to Title IX's goal of providing equal opportunities for all female students. Instead, including transgender female athletes in sports consistent with their gender identity helps guarantee that Title IX's goal of providing athletic opportunities for all students (and *all* girls) free of discrimination is realized.

Certain courts have also recognized that female athletic participation and Title IX's corresponding objectives are not meaningfully jeopardized by the inclusion of young males on otherwise all female teams, or vice versa. For example, the Eighth Circuit, in *Brenden v. Independent School District 742*, rejected essentialist assumptions "that physiological differences between males and females make it impossible for the latter to equitably compete with males in athletic competition."[28] In that case, the court held that a school's policy

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give consent for medical procedures in a given country and (ii) patients have lived continuously for at least 12 months in the gender role that is congruent with their gender identity.").

25. *See, e.g.*, MASS. DEP'T OF ELEM. & SECONDARY ED., GUIDANCE FOR MASSACHUSETTS PUBLIC SCHOOLS CREATING A SAFE AND SUPPORTIVE SCHOOL ENVIRONMENT: NONDISCRIMINATION ON THE BASIS OF GENDER IDENTITY, *available at* http://www.doe.mass.edu/ssce/GenderIdentity.pdf (explaining that a trans-inclusive school environment is necessary because "[a]ll students need a safe and supportive school environment to progress academically and developmentally" and because transgender students, "because of widespread misunderstanding and lack of knowledge about their lives, are at a higher risk of peer ostracism, victimization, and bullying").

26. 34 C.F.R. § 106.41(c) (requiring schools to "provide equal athletic opportunity for members of both sexes").

27. *See supra* Part II.A.

28. Brenden v. Indep. Sch. Dist., 477 F.2d 1292, 1299 (8th Cir. 1973).

preventing female students from participating on the boys' tennis, cross-country, and cross-country skiing teams violated the Equal Protection Clause and concluded that the school had not "demonstrated a sufficient rational basis for their conclusion that women are incapable of competing with men in non-contact sports."[29] The court also noted that in many sports "factors such as coordination, concentration, agility and timing play a large role in achieving success" and that there was no evidence indicating that males possessed those factors to a greater degree than females, that would prevent females from competing successfully.[30]

Similarly, in *Attorney General v. Massachusetts Interscholastic Athletic Association*, the Massachusetts Supreme Court held that a state statute that prohibited boys from participating on girls' athletic teams violated the Massachusetts Equal Rights Amendment.[31] The court held that the physical differences between males and females are "not so clear or uniform as to justify a rule in which sex is" an absolute bar to male participation on female teams.[32] Elaborating, the court explained that:

> The general male athletic superiority based on physical features is challenged by the development in increasing numbers of female athletes whose abilities exceed those of most men, and in some cases approach those of the most talented men. Coordination, concentration, strategic acumen, and technique or form (capabilities of both sexes) intermix with strength and speed (where males have some biologic advantages) to produce athletic results. Classification on strict grounds of sex, without reference to actual skill differentials in particular sports, would merely echo "archaic and overbroad generalizations."[33]

The court also noted that "women may, however, have an edge in sports that test balance, since their average lower center of gravity augments stability. They retain heat longer and enjoy far greater buoyancy than men—both advantages in swimming. There is also evidence of higher endurance levels and lower injury rates for females."[34]

Courts have also recognized that fears regarding males joining the sport in overwhelming numbers and denying females athletic opportunities are overblown and do not justify the exclusion of male participants. For example,

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29. *Id.* at 1300.

30. *Id.*; *see also* Weeks v. Southern Bell Telephone & Telegraph Co., 408 F.2d 228, 236 (5th Cir. 1969) (holding, in the Title VII employment context, that "technique is as important in strength" and "[t]echnique is hardly a function of sex").

31. Attorney Gen. v. Mass. Interscholastic Athletic Assoc., 393 N.E.2d 284,285-86, 296 (1979).

32. *Id.* at 293.

33. *Id.*

34. *Id.* at 293 n. 34.

in *Gomes v. Rhode Island Interscholastic League*, the court held that there was no evidence that the inclusion of a male on the previously all-female volleyball team "will lead to a sudden male influx or domination of Rhode Island interscholastic volleyball."[35] The court reached this conclusion even after recognizing, based on the expert evidence, that males on average may have an athletic advantage in terms of volleyball competition.[36] The Massachusetts Supreme Court reasoned similarly in *Attorney General v. MIAA*, holding that fears there would be "swamping of girls' teams by boys of skill and prowess superior to those of girls" were overblown.[37] The court emphasized that "[w]e neither know, nor are apprised by the record, that the apprehended peril is such as to require so sweeping a prohibition" and held that even if there were such evidence, it would not justify the ban.[38]

The same holds true for the inclusion of transgender girls on girls' teams. There is no evidence or indication that the number of transgender girls desiring to participant on a given sport could be significant enough to deny cisgender girls meaningful athletic opportunities, even assuming *arguendo* that transgender girls have innate physical advantages (which, as addressed more fully in Part IV below, they do not). Nor can mere speculation about such an influx of transgender female athletes serve as a rationale for their exclusion. In sum, the same outdated justifications that have been proffered—and rejected—for justifying absolute sex segregation of interscholastic sports teams in all instances provide no logical or legal basis to justify the wholesale exclusion of transgender athletes from participation on sports teams that align with the students' gender identity.

## II. TITLE IX LAW REGARDING DISCRIMINATION AGAINST TRANSGENDER STUDENTS

While there are currently no published Title IX decisions specifically about transgender students and their entitlement to participation in school athletics, Title IX's prohibition of sex discrimination can be read to require that transgender individuals be permitted to fully participate in school athletics. Title IX has been interpreted by courts and the U.S. Department of Education

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35. Gomes v. R.I. Interscholastic League, 469 F. Supp. 659 (D.R.I. 1979), *vacated on other grounds*, 604 F.2d 733 (1st. Cir. 1979).

36. *Id.* at 662.

37. Attorney Gen. v. Mass. Interscholastic Athletic Assoc., 393 N.E.2d 284, 293 (Sup. Ct. Mass. 1979).

38. *Id.* at 294. Despite the holding of *MIAA* and *Gomes*, courts have generally been more skeptical of attempts by boys to participate in traditionally all-girls sports. *See* Buzuvis, *supra* note 22, at 8-9 ("Courts considering claims by male athletes seeking to participate on a predominantly female team have similarly invoked concerns about preserving opportunities for female athletes. . . . [M]ale plaintiffs generally have less success than female plaintiffs seeking access to cross-sex teams, an asymmetry that also reflects and reinforces stereotypes about the superiority of male athletes.").

to prohibit harassment against gender nonconforming students.[39] For the same reasons that Title IX, which only generally refers to "sex" discrimination and harassment but not transgender discrimination specifically, has been extended to transgender individuals in the context of harassment, it should also be understood to guarantee transgender students equal educational opportunities free from discrimination.

### *A. Title IX Precedent Regarding Transgender or Gender Nonconforming Plaintiffs*

Courts and the Department of Education have held that Title IX prohibits discrimination and harassment against transgender individuals. For example, in *Miles v. New York University*, the Southern District of New York held that a transgender woman who was sexually harassed because she was female was entitled to the protection of Title IX.[40] The court held that "Title IX was enacted precisely to deter that type [of sexually harassing] behavior, even though the legislators may not have had in mind the specific fact pattern here involved."[41]

In addition, a number of court decisions have recognized that Title IX protects against harassment of students because they are perceived as gender nonconforming. For example, in *Pratt v. Indian River Cent. School Dist.,* the court held that "harassment based on nonconformity with sex stereotypes is a legally cognizable claim under Title IX."[42] In so holding, the court held that evidence that a male student was mocked as a "pussy," "sissy," and "girl" because of his perceived gender nonconformity constituted discrimination based on sex.[43] The court also held that, while federal law contains no explicit prohibition of sexual orientation-based discrimination, "allegations of harassment based on sexual orientation do not defeat a sex stereotyping harassment claim."[44] In accord, the court in *Doe v. Brimfield Grade School* held that "[d]iscrimination because one's behavior does not conform to stereotypical ideas of one's gender can amount to actionable discrimination based on sex" and held that harassment of a young boy based on his perceived femininity was actionable under Title IX.[45] Accordingly, just as a student perceived as gay can be protected under Title IX for harassment based on his perceived nonconformity with traditional gender expectations, so too does Title

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39. *See infra* Part III.A.

40. Miles v. N.Y. Univ., 979 F. Supp. 248 (S.D.N.Y. 1997).

41. *Id.* at 250.

42. Pratt v. Indian River Cent. Sch. Dist., 803 F.Supp.2d 135, 151 (N.D.N.Y. 2011).

43. *Id.*at 151-52.

44. *Id.* at 151.

45. Doe v. Brimfield Grade Sch., 552 F. Supp. 2d 816, 823 (C.D. Ill. 2008) (quotations omitted).

IX protect transgender individuals from harassment based on purported nonconformity with gender stereotypes.[46]

Moreover, in 2010 the U.S. Department of Education issued a letter (the "Dear Colleague Letter") explaining to school officials across the country that Title IX's prohibition on sex discrimination prohibits harassment of lesbian, gay, bisexual, or transgender students based on gender nonconformity.[47] The Dear Colleague Letter instructs that "[a]lthough Title IX does not prohibit discrimination based solely on sexual orientation, Title IX does protect all students, including lesbian, gay, bisexual, and transgender (LGBT) students from sex discrimination. When students are subjected to harassment on the basis of their LGBT status, they may also . . . be subjected to forms of sex discrimination prohibited under Title IX."[48] The letter continues, explaining that "harassing conduct [that] was based in part on the student's failure to act as some of his peers believed a boy should act" is actionable under Title IX.[49]

In addition, in 2013 the U.S. Department of Justice and Department of Education investigated the Arcadia Unified School District in Southern California for failing to permit a transgender boy to use the boys' restrooms, locker rooms, and other sex-segregated facilities at school.[50] In that case, the student—assigned female at birth—had lived as a boy full-time since the spring of his fifth grade year.[51] The investigation found that he was "consistently . . . accepted and treated as a boy by his [middle-school] classmates and teachers," only some of whom knew of his transgender status.[52] Nonetheless, the middle school refused to allow him to use boys' restrooms or locker rooms, "[c]iting generalized concerns about safety and privacy," instead requiring him to use a

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46. Other cases have reached similar results to those in *Pratt* and *Doe*. *See, e.g.*, Theno v. Tonganoxie Unified School Dist. No. 464, 377 F. Supp. 2d 952, 964 (D. Kan. 2005) (holding that peer harassment of a student for perceived failure to conform with gender stereotypes is actionable under Title IX); Snelling v. Fall Mountain Reg'l Sch. Dist., 2001 DNH 57 (Dist. Ct. N. H. 2001).

47. U.S. DEPARTMENT OF EDUCATION, "DEAR COLLEAGUE" LETTER (Oct. 26, 2010), *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf.

48. *Id.*

49. *Id.*

50. U.S. DEPT. OF JUSTICE CIVIL RIGHTS DIV. & U.S. DEPT. OF EDUC. OFFICE FOR CIVIL RIGHTS, LETTER TO ASAF ORR RE CONCLUSION OF INVESTIGATION IN DOJ CASE NO. DJ169-12C-79, OCR CASE NO. 09-12-1020 (July 24, 2013), *available at* http://www.nclrights.org/wp-content/uploads/2013/09/Arcadia_Notification_Letter_07.24.2013.pdf (hereinafter "ARCADIA LETTER"). This historic Voluntary Resolution Agreement was announced shortly after the resolution of a similar case in Colorado. IN RE COY MATHIS, COLO. DIV. OF CIVIL RIGHTS, CHARGE NO. P20130034X (June 17, 2013), *available at* http://www.transgenderlegal.org/media/uploads/doc_529.pdf. In that case, the Colorado Division of Civil Rights held that a school district had violated a first-grade transgender girl's civil rights by refusing to permit her to use the girls' restroom and requiring her to use a nurse's bathroom instead. *Id.* at 10.

51. ARCADIA LETTER, *supra* note 50, at 2.

52. *Id.* at 3.

private, gender-neutral restroom in the nurse's office as a restroom and a place to change for gym class.[53] (This was despite the fact that, as the investigation showed, the boys' locker room did not have functioning showers, had private changing areas, and that teachers, parents, and administrators "consistently stated that students did not fully disrobe when changing for P.E."[54]) As a result of this alternative arrangement, the student "regularly missed class time in both P.E. and other subjects because of the distance of the health office from the gym and his classrooms."[55] The arrangement also made the student uncomfortable "because it made him feel 'different'" and subjected him to unwanted questions from other students.[56]

The letter from the Department of Justice and Department of Education concluding the investigation noted that "[t]here is no dispute the District treated the student differently than other students because of his gender identity."[57] The investigation found that the district's alleged motivations related to the privacy and safety of the transgender student and all students were not grounded in fact.[58] Since the District agreed to voluntarily settle the matter, however, the investigation did not formally result in findings against the district.[59] Under the Voluntary Resolution Agreement,[60] the district agreed "to permit the Student to use male-designated facilities at school and on school-sponsored trips and to otherwise treat the Student as a boy in all respects."[61] The district also committed to change its policies and train staff to ensure that it "treat[s] . . . other transgender students . . . in a nondiscriminatory manner."[62]

These precedents, while not reaching the specific question of whether schools are required to permit transgender students to participate on sports teams consistent with their gender identity, make clear that Title IX's prohibitions on sex discrimination and sexual harassment can extend to transgender students if the discrimination or harassment is on "the basis of sex."[63]

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53. *Id.* at 3-4.

54. *Id.* at 4.

55. *Id.*

56. *Id.*

57. IN RE COY MATHIS, *supra* note 50, at 4.

58. *Id.* at 4-6.

59. *See* discussion *supra* note 50; *see also* IN RE COY MATHIS, *supra* note 50, at 2.

60. RESOLUTION AGREEMENT BETWEEN ARCADIA UNIFIED SCH. DIST., THE U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, & THE U.S DEP'T OF JUSTICE, CIVIL RIGHTS. DIV., OCR CASE NO. 09-12-1020, DOJ CASE NO. 169-12C-70 (Jul. 24, 2013), *available at* http://www.justice.gov/crt/about/edu/documents/arcadiaagree.pdf.

61. ARCADIA LETTER, *supra* note 50, at 7.

62. *Id.* at 7.

63. For a discussion of the shortcomings of the existing precedent, and the need for a rule that Title IX *per se* applies to discrimination on the basis of gender identity or transgender status, *see* Devi Rao, *Gender Identity Discrimination IS Sex Discrimination: Protecting Students from Bullying and Harassment Using Title IX*, 28 WIS. J. L. GENDER & SOC'Y 245 (2013).

### *B. Title VII Precedent Regarding Transgender or Gender Nonconforming Plaintiffs*

While case law involving transgender plaintiffs is scarce under Title IX, additional support for the conclusion that Title IX protects transgender student athletes can be found in cases interpreting Title VII of the 1964 Civil Rights Act.[64] Title VII, which prohibits sex discrimination in employment, has been applied regularly to claims of discrimination brought by transgender plaintiffs. Courts generally recognize that cases interpreting Title VII's provisions are relevant to and can be imported into analysis of Title IX.[65] The Supreme Court has cited to Title VII precedent when interpreting Title IX.[66] Indeed, the Supreme Court has recognized that in some ways Title IX's prohibition on discrimination is broader than that of Title VII.[67]

Particularly in recent years, federal courts have increasingly recognized that Title VII's prohibition on sex discrimination in employment extends to discrimination based on an individual's transgender status or gender nonconformity. Most prominently, in the landmark decision of *Macy v. Holder*, the Equal Employment Opportunity Commission (EEOC) held that discrimination against a person because she is transgender is sex discrimination.[68] In *Macy*, the complainant, a transgender woman, applied for a position with the Bureau of Alcohol, Tobacco, Firearms and Explosives.[69] When she applied for the job, the complainant had not yet transitioned and was still presenting as male.[70] After a phone interview, the complainant was offered the job, pending a background check.[71] Subsequently, she informed the prospective employer that she was in the process of transitioning and shortly thereafter she was informed the position was no longer available.[72] The complainant alleged that the job was revoked because she was transgender.[73]

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64. 42 U.S.C. § 2000e-2.

65. *See, e.g.*, Miles v. N.Y. Univ., 979 F. Supp. 248, 250 n. 4 (S.D.N.Y. 1997) (in the context of a transgender harassment suit, holding that "it is now established that the Title IX term 'on the basis of sex' is interpreted in the same manner as similar language in Title VII").

66. *See* Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 75 (1992) (citing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986), a Title VII case, for its interpretation of Title IX's employment discrimination provisions).

67. *See* Jackson v. Birmingham, 544 U.S. 167, 175 (2005) (noting that "Title IX is a broadly written general prohibition on discrimination, followed by specific, narrow exceptions to that broad prohibition. By contrast, Title VII spells out in greater detail the conduct that constitutes discrimination in violation of that statute.").

68. Macy v. Holder, EEOC Appeal. No. 0120120821, 2012 WL 1435995, *7-9 (Apr. 20, 2012).

69. *Id.* at *1.

70. *Id.*

71. *Id.*

72. *Id.* at *2.

73. *Id.* at *2 - *3.

The EEOC found that Macy's claim was cognizable under Title VII, holding that "a transgender person who has experienced discrimination based on his or her gender identity may establish a prima facie case of sex discrimination" and that "intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination 'based on . . . sex,' and such discrimination therefore violates Title VII."[74] The EEOC concluded that "Title VII prohibits discrimination based on sex whether motivated by hostility, by a desire to protect people of a certain gender, by assumption that disadvantage men, by gender stereotypes, or by the desire to accommodate other people's prejudice or discomfort" and that a transgender individual who is discriminated against based on his or her gender identity may establish a claim through any of these different formulations.[75]

In reaching this conclusion, the EEOC relied, in part, on the Supreme Court's seminal 1989 decision *Price Waterhouse v. Hopkins*.[76] There, the Supreme Court held that discrimination for failing to conform to gender-based expectations (for example, not acting like a woman "should" act) violates Title VII—in other words, that sex stereotyping constitutes actionable sex discrimination.[77] As the EEOC correctly reasoned in *Macy*, just as actions and assumptions based on sex stereotypes constitute sex discrimination, so too do actions taken against a transgender person for not conforming to stereotypes associated with their birth sex.[78]

Other federal courts have reached similar decisions. For example, in *Glenn v. Brumby*, the Eleventh Circuit held that a state employee who was fired after she transitioned from male to female was protected by the Equal Protection Clause of the Fourteenth Amendment.[79] According to the Eleventh Circuit, "discrimination against a transgender individual because of her gender non-conformity is sex discrimination, whether it's being described as on the basis of sex or gender."[80] Similarly, in *Schroer v. Billington*, a federal district court concluded after a bench trial that the Library of Congress violated Title VII when it refused to hire Diane Schroer after she informed the Library that she was transitioning to female.[81] The court held that the decision to rescind the job offer "after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was literally discrimination 'because of. . .sex'" by an analogy to religious discrimination, and therefore prohibited under Title VII.[82] Finally, in *Smith v. City of Salem*, the Sixth Circuit held that

74. *Id.* at *10-*11.

75. *Id.* at *10.

76. 490 U.S. 228 (1989).

77. *Id.* at 250.

78. Macy v. Holder, EEOC Appeal. No. 0120120821, 2012 WL 1435995, *7 (Apr. 20, 2012).

79. Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011).

80. *Id.* at 1317.

81. Schroer v. Billington, 577 F.Supp.2d 293 (D.D.C. 2008).

82. *Id.* at 308.

the district court erred in dismissing a firefighter's claim that her suspension from her job because she was transgender violated Title VII.[83] The court held that "[s]ex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior. A label, such as 'transsexual,' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity."[84]

In sum, while these cases may each rely on slightly different reasoning for concluding that Title VII's prohibitions on sex discrimination protect transgender individuals—that is, some rely on theories of sex-stereotyping akin to *Price Waterhouse,* whereas *Macy* holds that discrimination against transgender individuals is per se sex discrimination[85]—they each hold that discrimination against transgender individuals is sex discrimination under Title VII (or the Equal Protection Clause) and, therefore, transgender individuals are protected under the law.

Government agencies have begun to affirmatively recognize that Title VII's precedents regarding transgender employees are applicable to transgender students under Title IX. For instance, the July 2013 letter from the U.S. Department of Justice and Department of Education concluding the investigation into the Arcadia Unified School District's discriminatory treatment of a transgender student cited to *Macy*, *Glenn*, *Schroer*, and *Smith* for the proposition that Title VII has been interpreted to protect transgender individuals from discrimination based on their gender nonconformity or gender identity.[86] That letter explained that "[c]ourts rely on Title VII precedent to analyze discrimination 'on the basis of sex' under Title IX."[87]

Consistent with these decisions, holding that Title VII's and Title IX's sex-discrimination provisions include transgender discrimination, courts and regulatory bodies should interpret Title IX's guarantee of equal athletic opportunities to require that transgender students be permitted to participate on sports teams consistent with their gender identity. Transgender girls must be treated the same as all other girls, and transgender boys must be treated the same as all other boys. To do otherwise denies them full and equal access to the same educational opportunities as their peers.

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83. Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004).

84. *Id.* at 575.

85. For an in-depth discussion of the different legal theories under which transgender discrimination may be considered "sex" discrimination, *see* Erin Buzuvis, *"Because of Sex": Using Title IX to Protect Transgender Students from Discrimination in Education*, 28 WIS. J. L. GENDER & SOC'Y 219 (2013).

86. ARCADIA LETTER, *supra* note 50, at 2 n.3.

87. *Id.*

## III. THERE IS NO LEGITIMATE BASIS FOR DENYING TRANSGENDER STUDENTS THIS OPPORTUNITY

Several concerns are frequently raised in opposition to the inclusion of transgender students on athletic teams consistent with their gender identity. In addition to concerns regarding competitive advantages or disadvantages, addressed above, concerns regarding privacy in locker rooms and the alleged lack of an objective standard for determining whether a student is a boy or girl for athletic purposes are often raised. However, each of these concerns is dramatically overstated, and such fears can be easily addressed by common sense, practical solutions. These unrealistic fears cannot justify denying transgender youth the equal opportunity to participate in sports.

### *A. Inherent Differences in Physical Size and Ability*

It is generally presumed that natal males will have an inherent advantage over natal females. Among adults, men are on average 10% bigger than women.[88] The average man has longer arms, bigger and stronger legs, and more muscle fiber than the average woman.[89] The average woman has lower body weight and more body fat, with a lower center of gravity.[90] These differences largely result from the effect of sex hormones beginning in adolescence, although some may also stem from the cultural differences in opportunities and encouragement to participate in athletics between the sexes.[91] Even among adults, the range of physical differences within each sex is far broader than the average differences between men and women.[92]

As the National Collegiate Athletic Association explains in its official policy document concerning transgender student-athletes,

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88. Syda Kosofsky, *Toward Gender Equality in Professional Sports*, 4 HASTINGS WOMEN'S L.J. 209, 214-15 (1993); Cristen Conger, *Do men really have more upper body strength than women?*, at http://science.howstuffworks.com/life/human-biology/men-vs-women-upper-body-strength.htm.

89. Kosofsky, *supra* note 88, at 214-15; E. J. Miller, et al., *Gender Differences in Strength and Muscle Fiber Characteristics*, EUR. J. OF APPLIED PHYSIOLOGY & OCCUPATIONAL PHYSIOLOGY, Vol. 66, No. 3, 254 (1993).

90. Kosofsky, *supra* note 88, at 214-15.

91. Deborah L. Rhode, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 302-03 (1989) ("Physiological characteristics are heavily influenced by social norms governing diet, appearance, dress, behavior, and athletic opportunities. How much of males' advantage in most sports results from nature and how much from nurture remains unclear. It is, however, obvious that the differences in men's and women's capabilities are relatively small in comparison to the differences in opportunities now open to them.").

92. Hoover v. Meiklejohn, 430 F. Supp. 164, 166 (D. Colo. 1977) ("[W]hile males as a class tend to have an advantage in strength and speed over females as a class, the range of differences among individuals in both sexes is greater than the average differences between the sexes."); *see also* Women's Sports Foundation, Issues Related to Girls and Boys Competing With and Against Each Other in Sports and Physical Activity Settings, *available at* http://www.womenssportsfoundation.org/en/home/advocate/foundation-positions/equity-issues/coed_physical_activity_settings.

> Transgender women display a great deal of physical variation, just as there is a great deal of natural variation in physical size and ability among non-transgender women and men. Many people may have a stereotype that all transgender women are unusually tall and have large bones and muscles. But that is not true. A male-to-female transgender woman may be small and slight, even if she is not on hormone blockers or taking estrogen. It is important not to overgeneralize. The assumption that all male-bodied people are taller, stronger, and more highly skilled in a sport than all female-bodied people is not accurate.[93]

Prior to puberty, moreover, there are no significant differences in the physical size or ability of boys and girls.[94] For that reason, youth athletic teams are often integrated in the first instance.[95]

Even after puberty has begun, young people develop at different rates, and high-school-age students exhibit a wide range of physical characteristics.[96] Therefore, by necessity, high school sports, already accommodate students at vastly different levels of development.[97] The assumption that transgender girls will be inherently bigger, stronger, and more skilled is "especially inaccurate when applied to youth who are still developing physically and who therefore display a significantly broader range of variation in size, strength, and skill than older youth and adults."[98] Accordingly, age or physical development alone should not impede the integration of transgender students.

### *B. Privacy in Locker Rooms*

Apprehensions regarding locker room privacy can be easily resolved. As a general matter, both transgender students and non-transgender students often have concerns about privacy. These concerns can be easily addressed by offering private changing areas to any student who desires additional privacy,

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93. NAT'L COLLEGIATE ATHLETIC ASS'N, NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES 7 (Aug. 2011), *available at* http://www.uh.edu/lgbt/docs/Transgender_Handbook_2011_Final.pdf.

94. *See* TRANSGENDER LAW AND POLICY INSTITUTE, GUIDELINES FOR CREATING POLICIES FOR TRANSGENDER CHILDREN IN RECREATIONAL SPORTS 2-3, *available at* http://www.transgenderlaw.org/resources/trans_children_in_sports.pdf; Women's Sports Foundation, *supra* note 92, at 1 ("Prior to puberty, there is no gender-based physiological reason to separate females and males in sports competition.").

95. *See* Women's Sports Foundation, *supra* note 92, at 1-2 (recommending that sports teams for preadolescent children not be segregated according to sex).

96. *See* Hoover v. Meiklejohn, 430 F. Supp. 164, 166 (discussing the range of physical differences within each sex even after puberty).

97. See Pat Griffin & Helen J. Carroll, *On the Team: Equal Opportunity for Transgender Student Athletes* 13 (2009), *available at* http://www.nclrights.org/site/DocServer/TransgenderStudentAthleteReport.pdf?docID=7901

98. *Id.* at 16.

whether the student is transgender or not. A policy *requiring* transgender students to use a separate changing area, however, would have the potentially damaging effect of isolating and stigmatizing that student, and could reveal a student's transgender identity without their consent. School districts have begun to recognize that permitting transgender students to use locker rooms consistent with the students' gender identity is the best practice and that privacy concerns can simultaneously be reasonably accommodated.[99]

Guaranteeing transgender students access to locker rooms consistent with their gender identity is also critical to help ensure that they are fully included in all team- and camaraderie-building aspects of participating on sports teams. In the context of both middle and high school sports, significant amounts of strategizing, coaching, and bonding occurs in locker rooms while teams prepare for competition before games, during halftimes, and even after games. The failure to permit transgender athletes to participate in this aspect of the athletic experience would deprive them of a truly equal opportunity to participate.

### C. *Fraudulent Assertion of a Transgender Identity for Competitive Advantage*

Concerns regarding the use of a gender identity standard being open to subjective interpretation and abuse by students looking to gain a competitive advantage in a sport are also entirely unsubstantiated. To begin with, the continued prevalence of anti-transgender prejudice among young people makes it extremely unlikely that a cisgender boy would pretend to be transgender just to compete on a girls' team or in a girls' sport.[100] Moreover, there simply is no evidence that any man or boy has ever falsely asserted a female or transgender identity to obtain a competitive advantage. As the National Collegiate Athletic Association has recognized:

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99. *See, e.g.,* California Education Committee, LLC v. O'Connell, No. 34-2008-00026507-CU-CR-GDS (Cal. Super. Ct. June 8, 2009, *available at* http://www.nclrights.org/site/DocServer/Sac_Superior_Ct_decision_06.01.2009.pdf?docID=6041 ) (dismissing a lawsuit brought against a school district claiming that the district violated the privacy and safety of non-transgender students when it permitted a transgender boy to change in the boy's locker room); *see also* Los Angeles Unified Sch. Dist. Policy on Transgender and Gender Variant Students (Sept. 9, 2011), *available at* http://notebook.lausd.net/pls/ptl/docs/PAGE/CA_LAUSD/FLDR_ORGANIZATIONS/FLDR_GENERAL_COUNSEL/TRANSGENDER%20%20GENDER%20NONCONFORMING%20STUDENTS-REF-1557%201%209-9-11.PDF (providing that "students shall have access to the locker room facility that corresponds to their gender identity asserted at school" and requiring that all students be offered the opportunity for private changing areas).

100. *See generally* Emily A. Greytak, et al., *Harsh Realities: the Experiences of Transgender Youth in our Nation's Schools*, GAY LESBIAN STRAIGHT EDUCATION NETWORK (GLSEN) (2009), *available at* http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/001/1375-1.pdf (nationwide survey found that nine out of ten transgender youth had experienced harassment at school in the past year).

> [F]ears that men will pretend to be female to compete on a women's team are unwarranted given that in the entire 40 year history of "sex verification" procedures in international sport competitions, no instances of such "fraud" have been revealed. Instead, rather than identifying men who are trying to fraudulently compete as women, "sex verification" tests have been misused to humiliate and unfairly exclude women with intersex conditions. The apparent failure of such tests to serve their stated purpose of deterring fraud—and the terrible damage they have caused to individual women athletes—should be taken into account when developing policies for the inclusion of transgender athletes.[101]

Even if fraud were a realistic concern, it could be addressed with a simple requirement that the asserted gender identity be genuine.[102] That said, it will remain important that school districts and leagues not impose an excessively onerous standard, or one that relies inappropriately on apparent conformity with gender stereotypes, to test or validate a transgender student's gender identity. Such a standard would discriminate against transgender students by requiring them to conform to gender stereotypes or medical hurdles not required of any other students.

### *D. Best Practices for Integrating Transgender Student Athletes*

In reality, none of the asserted concerns relating to the integration of transgender student athletes pose problems when such policies are implemented in the real world. A growing number of school districts and athletic associations have already implemented viable, appropriate standards for including transgender students in athletic activities based solely on the student's gender identity.[103] While many of these statewide policies have been adopted in states that explicitly prohibit discrimination against transgender students, Title IX provides an equivalent basis for mandating such a policy even in states that lack explicit discrimination protections.[104]

In 2008,[105] the Washington Interscholastic Activities Association, the rulemaking body for high school sports teams in Washington State, adopted a first-in-the-nation policy permitting all students to participate in activities "in a

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101. NCAA, *supra* note 93, at 8.

102. *See, e.g.*, MASS. DEP'T OF ELEM. & SECONDARY EDUC., *supra* note 25 (describing Massachusetts standard requiring either that the student's identity be "consistent[ly] and uniform[ly] asserted *or* "other evidence that the gender-related identity is sincerely held as part of [the] person's core identity.").

103. *See* Bob Cook, *Schools on Notice to Figure Out How to Handle Transgender Athletes*, FORBES (March 2, 2013), *available at* http://www.forbes.com/sites/bobcook/2013/03/12/schools-on-notice-to-figure-out-how-to-handle-transgender-athletes/.

104. *See supra* Part III.

105. *See* Griffin & Carroll, *supra* note 97, at 26.

manner that is consistent with their gender identity, irrespective of the gender listed on a student's records."[106] The policy provides a detailed appeal procedure to be followed if "any questions arise whether a student's request to participate in a sex-segregated activity consistent with his or her gender identity is bona fide."[107] The appealing student can be asked to provide "documentation" of their "consistent gender identification (e.g., affirmed written statements from student and/or parent/guardian and/or health care provider)."[108]

In early 2013, Massachusetts Department of Elementary and Secondary Education adopted a comprehensive set of guidelines regarding equal opportunity for transgender students.[109] That policy provides: "Where there are sex-segregated classes or athletic activities, including intramural and interscholastic athletics, all students must be allowed to participate in a manner consistent with their gender identity."[110] The policy makes clear that the determining factor is the student's identity:

> Consistent with the statutory standard, a school should accept a student's assertion of his or her gender identity when there is "consistent and uniform assertion of the gender-related identity, or any other evidence that the gender-related identity is sincerely held as part of a person's core identity.'" If a student's gender-related identity, appearance, or behavior meets this standard, the only circumstance in which a school may question a student's asserted gender identity is where school personnel have a credible basis for believing that the student's gender-related identity is being asserted for some improper purpose.[111]

The Massachusetts guidance also recognizes, however, that due to widespread prejudice, transgender students may not feel safe "consistently" asserting their gender identity in all places and at all times.[112] The guidance, therefore, "does not require consistent and uniform assertion of gender identity as long as there is 'other evidence that the gender-related identity is sincerely

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106. WASH. INTERSCHOLASTIC ACTIVITIES ASSOC. HANDBOOK 2012-13, 18.15.0 ("Gender Identity Participation") and Appendix 6 ("Gender Identity"), *available at* http://www.wiaa.com/ConDocs/Con1125/FinalHandbook.pdf.

107. *Id.*

108. *Id.*

109. MASS. DEP'T OF ELEM. & SECONDARY ED., *supra* note 25; *see also* Travis Andersen, *Schools Get Guidelines on Transgender Students*, BOSTON GLOBE (Feb. 17, 2013), *available at* http://www.bostonglobe.com/metro/2013/02/17/transgender/FHmjIUlSZo0LCMy02xF97M/story.html.

110. MASS. DEP'T OF ELEM. & SECONDARY ED., *supra* note 25.

111. *Id.*

112. *Id.*

held as part of [the] person's core identity.'"[113] The guidance suggests that such evidence could include:

> [A] letter from a parent, health care provider, school staff member familiar with the student (a teacher, guidance counselor, or school psychologist, among others), or other family members or friends. A letter from a social worker, doctor, nurse practitioner, or other health care provider stating that a student is being provided medical care or treatment relating to her/his gender identity is one form of confirmation of an asserted gender identity. It is not, however, the exclusive form upon which the school or student may rely. A letter from a clergy member, coach, family friend, or relative stating that the student has asked to be treated consistent with her/his asserted gender identity, or photographs at public events or family gatherings, are other potential forms of confirmation. These examples are intended to be illustrative rather than comprehensive.[114]

In the spring of 2013, the California Interscholastic Federation (CIF), the body that governs competitive high school sports in the state, issued guidelines for the inclusion of transgender student athletes modeled closely after the Washington policy.[115] The CIF policy provides in relevant part: "All students should have the opportunity to participate in CIF activities in a manner that is consistent with their gender identity, irrespective of the gender listed on a student's records."[116] The California Legislature also recently passed a law clarifying the state's nondiscrimination law to specify that transgender students must be permitted to participate in all sex-segregated activities and use all sex-segregated facilities in accordance with the student's gender identity.[117]

It should be noted that policies governing participation in sports for adults often include some kind of requirement related to medical transition before transgender women can participate on women's teams, despite the fact that medical transition—particularly genital surgery—is not affordable, necessary, or appropriate for all transgender people.[118] Moreover, "whether a transgender person has genital reconstructive surgery has no bearing on their athletic ability."[119] The International Olympic Committee applies one of the most

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113. *Id.*

114. *Id.*

115. CALI. INTERSCHOLASTIC FED'N BYLAWS, 300 D ("Gender Identity Participation") (on file with author).

116. *Id.*

117. *See* Assem. B. 1266 (2013), *available at* http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB1266&search_keywords=.

118. *See, e.g.*, J.M. Grant et al., Injustice at Every Turn: A Report of the National Transgender Discrimination Study (2011), *available at* http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf.

119. *See* Griffin & Carroll, *supra* note 97, at 12.

onerous standards in the sporting world, requiring that transgender women who transition after puberty must undergo genital surgery, hormone therapy, and then wait two years following surgery before they can participate as women.[120] By contrast, in 2011, the National Collegiate Athletic Association adopted a policy much more closely aligned to the reality of transgender people's lives.[121] The NCAA policy requires that transgender women undergo only one year of hormone therapy before they can participate on women's teams.[122] The policy quotes Dr. Eric Vilain of UCLA as noting that "[r]esearch suggests that androgen deprivation and cross sex hormone treatment in male-to-female transsexuals reduces muscle mass; accordingly, one year of hormone therapy is an appropriate transitional time before a male-to-female student-athlete competes on a women's team."[123]

None of the model student policies described in this section as best practices require medical intervention for K-12 students, for all the reasons described in Part IV.a., supra. Some state policies have required medical intervention, however. Connecticut's governing body for high school sports, the Connecticut Interscholastic Athletic Conference (CIAC), has adopted a uniquely onerous standard that is even more difficult to meet than the NCAA standard for college-age student athletes.[124] The Connecticut policy largely tracks that of the International Olympic Committee.[125] The policy provides that a transgender student can only participate "in the gender of their birth certificate unless they have undergone sex reassignment," defined as follows:

> The student-athlete has undergone sex reassignment before puberty, OR
> The student who has undergone sex reassignment after puberty under all of the following conditions:
>
> Surgical anatomical changes have been completed, including external genitalia changes and gonadectomy.
> All legal recognition of the sex reassignment has been conferred with all the proper governmental agencies. (Driver's license, voter registration, etc.)
> Hormonal therapy appropriate for the assigned sex has been administered in a verifiable manner and for sufficient length of time to minimize gender-related advantages in sports

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120. *See* INT'L OLYMPIC COMM'N, STATEMENT OF THE STOCKHOLM CONSENSUS ON SEX REASSIGNMENT IN SPORTS (Nov. 12, 2003), http://www.olympic.org/Documents/Reports/EN/en_report_905.pdf.

121. NCAA, *supra* note 93.

122. *Id.* at 13.

123. *Id.*

124. *See* Buzuvis, *supra* note 22, at 26.

125. *Id.* The IOC policy requires, for transgender athletes who transition after puberty, complete genital surgery, removal of the gonads, hormone therapy, and a two-year waiting period. *See supra* note 120.

> competition.
> Athletic eligibility in the reassigned gender can begin no sooner than two years after all surgical and anatomical changes have been completed.[126]

In 2011, however, the state of Connecticut adopted a nondiscrimination law that specifically prohibits the state's public schools from discriminating against transgender students.[127] Subsequently, in April 2012, the state's Commission on Human Rights and Opportunities published on its website guidance created by the Connecticut Safe Schools Coalition which provides in relevant part that "[t]ransgender students should be permitted to participate in sex-segregated athletic activities based on their gender identity."[128] It seems likely that CIAC's onerous standard will need to be revisited in the near future to bring it into accordance with the state's nondiscrimination policy.

Colorado provides an example of the evolving understanding of the best practice in this area. The Colorado High School Activities Association adopted a policy in 2009 that required medical transition before a transgender student could participate in sports in accordance with his or her gender identity.[129] The original Colorado policy provided that a transgender student could participate only after "hormonal therapy appropriate for the assigned sex has been administered in a verifiable manner and sufficient length of time to minimize gender-related advantages."[130]

As noted above, however, requiring medical intervention for transgender minors is particularly unfair and impractical. By the 2012-2013 school year, Colorado's policy had been modified to provide:

> The Colorado High School Activities Association in accordance with Equal Protection Clause of the United States Constitution does not prohibit transgender students from participating in athletics. A transgender student-athlete's home school will perform a confidential

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126. CONN. INTERSCHOLASTIC ATHLETIC CONFERENCE HANDBOOK 2012-2013, Art. IX, Sec. B ("Transgender Participation") at 54, *available at* http://www.casciac.org/pdfs/ciachandbook_1213.pdf.

127. CONN. GEN. STAT. § 10-15c.

128. *See* CONN. STATE DEPT. OF EDUC., BULLYING AND HARASSMENT RESOURCE PAGE (link to "Guidelines for Schools on Gender Identity and Expression"), *available at* http://www.sde.ct.gov/sde/cwp/view.asp?a=2700&Q=322402.

129. *See* Buzuvis, *supra* note 22, at 26-27.

130. *Id.* Oregon's policy similarly requires transgender girls to undergo hormone treatment before they can play on a girls' team. OR. SCH. ACTIVITIES ASSOC., 2012-13 OSAA HANDBOOK, *available at* http://www.osaa.org/publications/handbook/1213/06ExecutiveBoardPolicies.asp (permitting a male-to-female transgender student who is not taking hormones to participate only on boys' teams, but permitting a male-to-female transgender student who has taken hormones for at least one year to participate on girls' teams).

> evaluation to determine the appropriate gender assignment for the prospective student-athlete. The CHSAA will follow approved policy procedures to ensure that gender-related advantages and safety concerns are minimized.[131]

In April 2013, the CHSAA Board of Directors approved further revisions to the policy regarding transgender student athletes. The Board's minutes from their April 2013 meeting indicate that the policy was being updated "to more accurately reflect the current state and federal laws with regards to discrimination and inclusion."[132] The new policy states affirmatively that "The Colorado High School Activities Association recognizes the right of transgender student athletes to participate in interscholastic activities free from unlawful discrimination based on sexual orientation."[133] (Under Colorado law, discrimination based on "transgender status" is included under its prohibition of discrimination based on "sexual orientation."[134]) The new policy language removes the vague, ominous references to the need to address "gender-related advantages" and "safety concerns." Instead, similar to the Massachusetts guidance, the policy lays out specific procedures that should be followed to identify the genuine gender identity of a transgender student, providing that relevant documentation could include:

> A written statement from the student affirming the consistent gender identity and expression to which the student self-relates.
> Documentation from individuals such as, but not limited to parents, friends, and/or teacher, which affirm that the actions, attitudes, dress and manner demonstrate the student's consistent gender identification and expression.
> Written verification from an appropriate health-care professional (doctor, psychiatrist, psychologist) of the student's consistent gender identification and expression.
> Medical documentation (hormonal therapy, sexual re-assignment surgery, counseling, medical personnel, etc.)[135]

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131. CHSAA, CHSAA 2012-2013 HANDBOOK, *available at* http://www.chsaa.org/about/pdf/Handbook-12-13.pdf.

132. *See* COLO. HIGH SCH. ACTIVITIES ASSOC., BOARD OF DIRECTORS MEETING MINUTES (April 2013), *available at* http://www2.chsaa.org/about/pdf/BDMinutesApril2013.pdf

133. CHSAA, *supra* note 131, at Art. 3, 300, *available at* http://www.chsaa.org/home/pdf/TRANSGENDERPROCEDUREPOLICY.pdf.

134. COLO. REV. STAT. ANN. § 22-32-109(1)(*ll*)(I) (providing that all public schools must adopt policies that prohibit discrimination based on sexual orientation); COLO. REV. STAT. ANN. §§ 2-4-401(13.5) (throughout Colorado statutes, "'[s]exual orientation' means a person's orientation toward heterosexuality, homosexuality, bisexuality, or transgender status or another person's perception thereof").

135. *See* CHSAA, *supra* note 132.

As in the Washington, Massachusetts, and California policies, the student's identity is (appropriately) the touchstone; once that is established, no additional inquiry is required or permitted.

Several organizations have also developed detailed, in-depth policies with recommendations regarding the treatment of transgender student athletes.[136] For example, model school district policies promulgated by the GLSEN and the National Center for Transgender Equality[137] and the California Safe Schools Coalition[138] include provisions requiring that transgender students be permitted to participate in sex-segregated intramural and interscholastic sports teams, as well as physical education classes, on the basis of their gender identity.

The most robust resource on this issue is a report published in 2009 entitled "On the Team: Equal Opportunities for Transgender Student Athletes."[139] That report was the result of a 2009 "think tank" meeting that brought together advocates, educators, doctors, and coaches to discuss and identify the best practices for ensuring that transgender students could participate in high school and collegiate athletics.[140] The think tank produced recommended policies for high school and collegiate athletic programs.[141] The recommended collegiate policy was subsequently adopted by the NCAA; as noted, it provides that a transgender woman can play on a women's team after undergoing one year of hormone therapy.[142] The report's recommended policy for high school athletics, by contrast, provides that a student "shall be allowed to participate in a sports activity in accordance with his or her gender identity irrespective of the gender listed on the student's birth certificate or other student records, and regardless of whether the student has undergone any medical treatment."[143]

The largest recreational sports league in the nation, the U.S. Soccer Federation, has also adopted an inclusive policy for the participation of transgender athletes, both youth and adults. That policy was enacted in 2012 in order to ensure a consistent standard would be applied after the Federation decided to allow Jazz, the 11-year-old transgender girl, to play on a girls' team.[144] Like the other "best practice" policies identified above, the

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136. *See, e.g.*, Griffin & Carroll, *supra* note 97.

137. GLSEN AND NATIONAL CENTER FOR TRANSGENDER EQUALITY, MODEL DISTRICT POLICY ON TRANSGENDER AND GENDER NONCONFORMING STUDENTS, *available at* http://glsen.org/article/transgender-model-district-pol.

138. CAL. SAFE SCH. COALITION, MODEL SCHOOL DISTRICT POLICY REGARDING TRANSGENDER AND GENDER NONCONFORMING STUDENTS, *available at* http://www.casafeschools.org/csscmodelpolicy1209.pdf.

139. Griffin & Carroll, *supra* note 97.

140. *Id.* at 2.

141. *Id.*

142. NCAA, *supra* note 93, at 13.

143. Griffin & Carroll, *supra* note 97, at 24.

144. *See* Dan Woog, *US Soccer and All That Jazz,* BETWEEN THE LINES NEWS (March 7, 2013), *available at* http://www.pridesource.com/article.html?article=58803 (describing adoption of the new policy).

Federation's new policy relies solely on the player's gender identity, without any requirement of medical transition:

> For the purposes of registration on gender-based amateur teams, a player may register with the gender team with which the player identifies, and confirmation sufficient for guaranteeing access shall be satisfied by documentation or evidence that shows the stated gender is sincerely held, and part of a person's core identity. Documentation satisfying the herein stated standard includes, but is not limited to, government-issued documentation or documentation prepared by a health care provider, counselor, or other qualified professional not related to the player.[145]

It is important to note that none of the "best practice" policies described above prohibits a transgender student who has not undergone medical transition from participating on the team associated with the student's sex assigned at birth.[146] For some transgender students, especially those in the early stages of transition, continuing to participate on a team based on their assigned sex may feel more comfortable. No current policy dictates that a transgender student *must* play on the team associated with their gender identity, nor should they. That decision should be made by the individual transgender student based on his or her needs including privacy, safety, and comfort.[147] For example, Kye Allums, a transgender man, played on the women's basketball team at George Washington University before he had undergone hormone treatment, as permitted by NCAA policy.[148]

In sum, while opponents sometimes raise concerns regarding the feasibility or fairness of integrating transgender students into athletic teams, those concerns are vastly overstated and cannot justify excluding transgender student athletes or requiring them to play on a team that conflicts with who they are. Instead, permitting transgender students to participate in athletics on the basis of their gender identity is by far the most fair and practical solution, as well as the only approach that is consistent with Title IX's non-discrimination requirements.

### *E. Equal Access to Sports Is Critically Important to the Well-Being of*

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145. U.S. SOCCER FED'N TRANSGENDER INCLUSION POLICY (on file with authors).

146. *See, e.g.*, Griffin & Carroll, *supra* note 97, at 24 (Recommended Policy for High School Athletics) ("This policy shall not prevent a transgender student athlete from electing to participate in a sports activity according to his or her assigned birth gender.").

147. *See, e.g.*, NCAA, *supra* note 93, at 13 ("Any transgender student-athlete who is not taking hormone treatment related to gender transition may participate in sex-separated sports activities in accordance with his or her assigned birth gender.").

148. *See* Erik Brady, *Transgender Male Kye Allums on the Women's Team at GW*, USA TODAY (Nov. 4, 2010), *available at* http://usatoday30.usatoday.com/sports/college/womensbasketball/atlantic10/2010-11-03-kye-allums-george-washington-transgender_N.htm?csp=digg.

*Transgender Students*

As outlined above, if interpreted consistently with Title VII, Title IX prohibits schools from discriminating against transgender students and guarantees such students equal access to all educational opportunities, including athletics. Nor does any legitimate policy basis justify the exclusion of transgender students from sports teams that accord with their gender identity. But, perhaps most compelling, providing transgender students an equal opportunity to participate in athletics is essential to their well-being, self-esteem, and mental health.

Significant research over the past half-century has demonstrated the value that participation in sports can have for young people.[149] Numerous studies across the fields of sports medicine, psychology, human development, and public health have examined the effects of participation in youth sports.[150] These studies confirm that youth sports participation benefits the participants in multiple ways. Physically, participation helps build bone and muscle strength, reduces the risk of developing chronic diseases, reduces the risk of obesity, and helps develop habits of exercise with long-term benefits.[151] Psychologically, participation in sports helps promote mental health and combat anxiety and depression.[152] In fact, sports participation can be a protective factor against adolescent suicide,[153] which may be particularly important given the high rates of social isolation and suicide attempts among transgender youth.[154] Sports

149. Kelly P. Troutman & Mikaela J. Dufur, *From High School Jocks to College Grads: Assessing the Long-Term Effects of High School Sport Participation on Females' Educational Attainment*, YOUTH SOCIETY Vol. 38 No. 4, 443 (June 2007) ("Numerous studies centered on high school athletics have demonstrated that participants in interscholastic sport enjoy various positive benefits from their involvement.").

150. *See* Suzanne Le Menestrel & Daniel F. Perkins, *An overview of how sports, out-of-school time, and youth well-being can and do intersect*, NEW DIRECTIONS FOR YOUTH DEVELOPMENT, No. 115, 13-14 (Fall 2007).

151. *See Id.* at 14-15 (noting that "[t]he most recent dietary guidelines for American advise that children and youth should be involved in at least sixty minutes of physical activity on all or most days of the week" and that "The health benefits of participation in physical activity have been well documented: building healthy bones and muscle; reducing the risks of developing chronic diseases such as heart disease and diabetes; reducing the chance of being overweight and obese; reducing feelings of anxiety, depression, and hopelessness; and promoting psychological well-being.").

152. *Id.* at 15.

153. Lindsay A. Taliaferro et al., *High School Youth and Suicide Risk: Exploring Protection Afforded Through Physical Activity and Sport Participation*, J. SCH. HEALTH, Vol. 78, No. 10, 545, 552 ("we found that sport participation related to reduced risk of hopelessness and suicidal behavior").

154. Among transgender students in K-12 schools, nearly 50% have attempted suicide. *See, e.g.*, SAN FRANCISCO UNIFIED SCH. DIST., KEEPING OUR LGBT YOUTH SAFE AND IN SCHOOL, *available at* http://www.healthiersf.org/LGBTQ/GetTheFacts/docs/LGBTQ_websiteHealthSurvey1011.pdf (featuring results from the 2011 Youth Risk Behavior Survey, developed by the U.S. Centers for Disease Control and Prevention). Nine out of 10 transgender youth have been harassed at school in the last year. *See* Greytak, et al., *supra* note 100.

also provide a social support network and integration that, in turn, further enhances youth mental health.[155]

Involvement in team sports also leads to higher academic outcomes for children.[156] Studies have confirmed that participation in athletics is predictive of outcomes such as staying in school, and increases general measures of positive adjustment.[157] Studies also reveal that high school athletes are more likely to attend and graduate from college than those who do not participate in high school sports.[158] Sports participation also has a positive impact on students' GPAs while in high school.[159] In addition, sports participation builds values such as teamwork, sportsmanship, and hard work and improves social skills.[160]

These social, mental, and physical benefits of interscholastic sports participation are even more necessary for vulnerable groups such as transgender students.[161] Not allowing these students to play on sports teams consistent with their gender identity will only increase feelings of isolation and despair. Moreover, requiring that they play on teams consistent with their natal birth is impractical and forces them to reject their gender identity. Many

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155. Taliaferro et al., *supra* note 153, at 551 ("Athletes may experience greater social integration when they become members of a social network that includes teammates, coaches, health professionals, family, and community. The team sport environment represents a fertile ground for adolescent self-esteem development because teams provide opportunities for youth to engage with adults and peers to achieve collective goals. Through its capacity to foster social support and integration, sports participation may create a distinct form of protection against risk factors associated with adolescent suicide.").

156. Bonnie L. Barber, Jacquelynne S. Eccles, & Margaret R. Stone, *Whatever Happened to the Jock, the Brain, and the Princess? Young Adult Pathways Linked to Adolescent Activity Involvement and Social Identity*, J. OF ADOLESCENT RES., Vol. 16, No.5, 429, 430 (September 2001) ("activity participation is linked to better school achievement, educational attainment, occupational status, and income").

157. *Id.*

158. Troutman & Dufur, *supra* note 149, at 458 ("Results from this sample of females provide evidence that supports the hypothesis that females who played high school sport are more likely to graduate from college than are their counterparts").

159. Jacquelynne S. Eccles & Bonnie L. Barber, *Student Council, Volunteering, Basketball, or Marching Band: What Kind of Extracurricular Involvement Matters?*, J. OF ADOLESCENT RES., Vol. 14, No. 1, 10, 18 (Jan. 1999) ("[S]ports participation predicted an increase in liking school between 10th and 12th grades, a higher than expected 12th-grade GPA, and a greater than expected likelihood of being enrolled full-time in college at 21.").

160. *Get Set To Make the Case, Presenting Sports as an Agent for Social Change*, *available at* http://digitalcommons.calpoly.edu/cgi/viewcontent.cgi?article=1028&context=rpta_fac (collecting research concluding that "[s]ports can help kids improve their self-esteem and develop important social and leadership skills. . .teamwork skills, and initiative").

161. Biegel, *supra* note 24, at 193 ("Too often, transgender youth are restricted to sports teams that do not correspond to their gender identities. Gender-nonconforming students cannot help but see this as yet one more way in which they are not take seriously and are told that their identities are not valid. In general, it is recommended that, as much as possible, students should be permitted to participate in gender-segregated sports and gym class activities in accordance with the gender with which they identify.").

transgender students—particularly those who are not "out" as transgender, but simply living as a member of the sex with which they identify—would refuse to play sports altogether rather than be forced to play as a member of their birth-assigned sex. Indeed, this is the reaction most people, transgender or not, would likely have upon being required to be identified as a member of the other sex in order to play a sport. Requiring transgender children, and none others, to play on teams inconsistent with their gender identity is discriminatory, and denies those young people access to the innumerable benefits that athletics can provide.

In addition to the direct, inherent value that including transgender students will have to the students that are allowed to participate on teams consistent with their gender identity, such a policy will also have broader societal effect on attitudes towards transgender individuals and transgender rights. As Professor Stuart Biegel has explained:

> [I]t is important to emphasize just how substantial and just how direct the influence of organized sports can be on the lives of our young people. The numbers alone reveal the scope of the impact. A very large percentage of America's youth participate in organized sports, from the little leagues through high school, college, and beyond. In light of this level of participation, it is inevitable that a substantial number of young people will be influenced by the cultures, traditions, and mindsets highly prevalent in these programs.[162]

Accordingly, in order to guarantee that every child's right to equal educational opportunity is protected, consistent with Title VII and Title IX precedent, transgender students must be permitted to play on sports teams consistent with their gender identity.

## CONCLUSION

If correctly interpreted, consistent with Title VII employment discrimination precedent and Title IX precedent regarding gender-based harassment, Title IX prohibits discrimination against transgender individuals. Therefore, under Title IX, transgender students must be provided equal opportunities to participate in school athletics consistent with their gender identity: transgender boys must be treated like all other boys and transgender girls must be treated like all other girls. This interpretation of Title IX is also consistent with case law addressing the integration of traditionally sex-segregated sports, which has already debunked several of the concerns regarding limited participation of males on female sports teams and vice versa, including concerns regarding the risk of injuries and competitive disadvantages.

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162. *Id.* at 151.

More importantly, hypothetical concerns regarding injuries or overblown fears regarding locker room privacy cannot trump the need to comply with Title IX's mandate that all children—including transgender children—be provided with equal opportunities to participate in athletics. Permitted to participate on athletic teams consistent with their gender identity, transgender students—one of society's most vulnerable and at-risk populations—will reap tremendous benefits to their self-esteem and mental and physical health. When transgender students are fully integrated and able to thrive at school like all other students, their teammates, competitors, and communities will be enriched as well.